MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 5)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-52 OF 1996
KAMALANATHAN RATNAM JC
15 DECEMBER 1997

Civil Procedure *— Trial — Preliminary issue — Whether issue as to liability of partners in a partnership ought to be tried as a preliminary issue — Whether issues affecting partners' liability could be separated, severed or disjuncted from the main trial of the first defendant's liability in the action*

The partners of the second defendant ('the partners') applied for an order that the issue of their liabilities for the alleged acts of the first defendant in a defamation suit be tried as a preliminary issue and severed from the trial of the first defendant's liability. They contended that the issues affecting the second defendant's liability were mainly legal issues which could be disposed of on a preliminary basis without the need for a full trial with viva voce evidence and the attendances of witnesses. It was also arged that the issues arising out of the first defendant's defence would involve complex factual inquiry into areas which are of no concern or relevance to the issues affecting the second defendant.

Held, dismissing the application with costs:

The issues affecting the second defendant's and thus the partners' liability in the suit could not be separated, severed or disjuncted from the main trial of the first defendant's liability in the action. The evidence to be adduced at the full trial of the action to establish the liability of the first defendant and the second defendant is common and similar. The legal issues affecting the second defendant's liability could not be dealt with or determined without taking into account and considering the whole body of evidence and testimony to be adduced at the trial to determine the liability of the first defendant. Therefore, the liability of the first defendant and the second defendant had to be tried together at the same main trial. Furthermore, the splitting of the trial into pre-emptive issues and the main trial would provide the applicants herein an unfair advantage of having prior knowledge of the evidence adduced by the plaintiffs when the preliminary issues were heard (see pp 230F–I and 231A).

[Bahasa Malaysia summary

Pekongsi-pekongsi defendan kedua ('pekongsi-pekongsi') memohon untuk satu perintah bahawa isu mengenai liabiliti mereka atas perbuatan defendan pertama yang dikatakan dalam guaman fitnah dibicarakan sebagai isu permulaan dan berasingan daripada perbicaraan liabiliti defendan pertama. Mereka menghujahkan bahawa isu-isu yang menjejaskan liabiliti defendan kedua kebanyakannya isu-isu undang-undang yang boleh diselesaikan atas dasar permulaan tanpa keperluan untuk perbicaraan penuh dengan keterangan viva

A voce dan kehadiran saksi-saksi. Ia juga dihujahkan bahawa isu-isu yang timbul dari pembelaan defendan pertama akan membangkitkan siasatan faktual yang kompleks dalam bahagian yang tidak berkenaan dengan atau relevan kepada isu-isu yang menjejaskan defendan kedua.

B **Diputuskan**, menolak permohonan dengan kos:

Isu-isu yang menjejaskan liabiliti defendan kedua dan justeru itu rakan-rakan dalam guaman tidak boleh diasingkan atau diputuskan dari perbicaraan utama liabiliti defendan pertama dalam tindakan. Keterangan untuk dikemukakan di perbicaraan penuh tindakan bagi membuktikan liabiliti defendan pertama dan defendan kedua adalah C bersalingan dan serupa. Isu-isu undang-undang yang menjejaskan liabiliti defendan kedua tidak dapat diuruskan atau ditentukan tanpa mengambil kira dan mempertimbangkan keseluruhan keterangan dan testimoni untuk dibentangkan di perbicaraan bagi menentukan liabiliti defendan pertama. Maka, liabiliti defendan pertama dan defendan D kedua hendaklah dibicarakan di perbicaraan utama yang sama. Tambahan pula, pembahagian perbicaraan kepada isu-isu terlebih dahulu dan perbicaraan utama akan memberikan permohon-pemohon kelebihan mempunyai pengetahuan dahulu yang tidak adil atas keterangan yang dikemukakan oleh plaintif-plaintif apabila isu-isu E permulaan didengar (lihat ms 230F–I dan 231A).]

Notes

For cases on preliminary issue, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4926–4928.

F

Cases referred to

Arab Malaysian Finance Bhd v Meridien International Credit Corp Ltd London [1993] 3 MLJ 193 (refd)

Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor [1997] G 2 MLJ 252 (refd)

Mercantile Credit Co Ltd v Garrod Another [1962] 3 All ER 1103 (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)

Richards v Naum [1967] 1 QB 620 (refd)

H

Legislation referred to

Partnership Act 1961 ss 7, 12

Rules of the High Court 1980 O 33 r 2

I *Cecil Abraham* (*RS Nathan* and *G Rajasingam* with him) (*Shearn Delamore & Co*) for the applicant/second defendant.

VK Lingam (*V Sivaparanjothi* and *R Thayalan* with him) (*V Siva & Partners*) for the respondents/plaintiffs.

Darryl Goon (*Raja Darryl & Loh*) for the first defendant.

Yew Lee Ann (*N Navaratnam & Co*) for K Anantham, a partner of the second defendant.

Cur Adv Vult A

Kamalanathan Ratnam JC:

The application

This is an application (encl 52) by the partners of the second defendant, B save for Dato' Ranita bte Mohd Hussein, K Anantham and Tommy Thomas, for an order that the question of the liability of the partners of the second defendant for the alleged acts of the first defendant be tried as a preliminary issue.

C

The background facts

The background facts leading to this application have already been stated in my written judgment dated 23 July 1997 given in respect of a similar application made by Dato' Ranita Hussein herself and which said judgment is the first in the series of judgments arising out of this case and reported D in [1997] 3 MLJ 395 and which is under appeal.

The plaintiffs' claim is for slander in respect of the alleged oral statements made during conversations between the first defendant and David Samuels and for libel in respect of the re-publication of the alleged oral statements in an article entitled 'Malaysian Justice on Trial' ('the E article') in the International Commercial Litigation Magazine ('the magazine') in November 1995. The partners of the second defendant in the amended defence have denied that they are vicariously liable for the alleged acts of the first defendant. These defendants have also denied in the defence that the alleged acts of the first defendant were either:

F

(a) acts of one partner for the carrying on in the usual way of the business of the kind carried on by the firm which will bind his co-partners (which is a defence arising out of s 7 of the Partnership Act 1961); or

(b) acts done by one partner in the ordinary course of business of the G firm or with the authority of his co-partners (which arises out of s 12 of the Partnership Act 1961).

They are also not pleading any of the traditional defences such as justification or qualified privilege such as that pleaded by the first defendant.

H

Order 33 r 2 of the Rules of the High Court 1980

It is obvious that this application is made pursuant to O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). Having read the cases relating to this rule, namely *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, *Arab Malaysian Finance Bhd v Meridien International Credit Corp Ltd London* I [1993] 3 MLJ 193, *Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor* [1997] 2 MLJ 252, and the *Supreme Court Practice 1997* and *Halbury's Laws of England* (4th Ed), the relevant principles by which an application under this rule is to be dealt with can be distilled. The following principles stand out, namely:

(1) This rule confers upon the court a discretionary power to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter.

(2) The said application may not be appropriate where facts are in dispute or extrinsic evidence is required to be adduced.

(3) This application should not be dealt with on the basis of a hypothetical set of facts.

(4) The overriding consideration is whether the application would result in a substantial saving of time and expenditure.

(5) The point of law should be raised on the pleadings.

(6) That the court should warn itself against the abuse of this process.

The case for the partners of the second defendant

The partners argue that the trial of those issues affecting the second defendant ought to be tried as a preliminary issue under this rule and severed from the trial of the first defendant's liability. They contend that the issues affecting the second defendant's liability are mainly legal issues which can be disposed of on a preliminary basis without the need for a full trial with viva voce evidence and the attendances of witnesses. Alternatively, they argue that facts can be agreed upon if directions are given or that the facts can be resolved in the course of determining the preliminary point. It is also their submission that the second defendant's liability falls to be determined on the limited basis of ss 7 and 12 of the Partnership Act 1961, which are largely issues of law with some issues of fact. It was pointed out that for the purposes of s 7 of the Partnership Act, the issue is whether the acts of the first defendant were done for the carrying on in the usual way, the business of the kind carried on by the second defendant; and for the purposes of s 12 of the same Act, the issue is whether the acts of the first defendant were in the ordinary course of the business of the second defendant. It was urged upon me that the issues arising out of the first defendant's defence would involve complex factual inquiry into areas which are of no concern or relevance to the issues affecting the second defendant and further that the trial of those issues would be lengthy and that the partners of the second defendant would be passive participants.

The plaintiffs' case

The plaintiffs' defence to this application rests with their contention that they had both in the statement of claim and in the reply to the defence pleaded that the first defendant had at all material times acted in his capacity as a partner of the second defendant. It was also pleaded that the second defendant, at the material time and in the ordinary course of business, acted as a firm of advocates and solicitors through the first defendant and another partner, Ambiga Sreenevasan, for East Asiatic Company ('EAC') in the litigation brought by Malaysia Borneo Finance Holdings ('MBFH') and its subsidiaries. The plaintiffs had also pleaded that the said defamatory words spoken by the first defendant concerned

the subject matter of the litigation brought by MBFH and its subsidiaries against EAC and/or purported to give an account of the first defendant's own knowledge and direct experience derived from acting therein in his capacity as a partner of the second defendant in the second defendant's ordinary course of business. It was contended that the said article accurately and prominently referred and quoted the first defendant as a partner of the second defendant. The plaintiffs had also pleaded particulars of bad faith and malice and express malice on the part of the first defendant when he spoke and published the said words on his own behalf and/or for and on behalf of the second defendant. There is also a plea that the second defendant, namely the said partners, are vicariously liable for the malice of the first defendant when he spoke and published the said defamatory words.

Court's findings

In the light of the plaintiffs' express plea adverted to above, it is my judgment that the second defendant's contention that they through the partners are not liable for the acts of the first defendant who acted as a partner of the second defendant at the material time and pursuant to ss 7 and 12 of the Partnership Act 1961 cannot be accepted. It is my finding that the alleged defamatory words spoken and published by the first defendant are both intrinsically and inextricably linked and knotted with the second defendant's ordinary course of business so much so that the first defendant and the second defendant are to my mind joint and several defendants to this action. It is not denied that the first defendant acted for EAC/MBFH in the litigation because he was a partner of the second defendant and that the second defendant was the firm of advocates and solicitors on record for EAC. I hold that the issues affecting the second defendant's and thus the partners' liability in this suit cannot be separated, severed or disjuncted from the main trial of the first defendant's liability in this action. Unlike the Gordian knot of the King of Phrygia which remained knotted until cut by Alexander the Great, it is my judgment that no swirling sword can sever this inextricably knotted liability between an act of the first defendant and the second defendant, namely the partners. I find that the evidence to be adduced at the full trial of this action to establish the liability of the first defendant and the second defendant is common and similar. It is my judgment that the legal issues affecting the second defendant's liability cannot be dealt with or determined without taking into account and considering the whole body of evidence and testimony to be adduced at the trial to determine the liability of the first defendant. I hold that the liability of the first defendant and the second defendant has to be tried together at the same main trial. The plaintiffs stated in their submission that the second defendant will be subjected to intensive and vigorous cross-examination on the various issues in this action. On that basis, I cannot see how the partners can remain passive participants, as contended by the second defendant.

Besides, it is my judgment that the splitting of the trial into pre-emptive issues and the main trial would provide the applicants herein an

A unfair advantage of having prior knowledge of the evidence adduced by the plaintiffs when the preliminary issues are heard. It is in any case trite law that preliminary points of law cannot be determined before ascertaining the facts of the case (see *Richards v Naum* [1967] 1 QB 620). In the first case decided by me in these series where Dato' Ranita, a partner in the second defendant, applied to have the issue of her liability as a partner to B be determined as a preliminary issue I had said, at p 400 as follows:

> ... The question of deciding [Dato' Ranita's] liability, if I allow this application, would mean having a trial within a trial because that is what it amounts to.

C I further held that although preliminary issues can effectively conclude the entire cause of action in which such preliminary issue arises, it is the duty of the court to exercise judicial discretion with great care in selecting the proper cases where such procedures ought to be followed, lest the intended purpose of short circuiting proceedings (which is the purpose of trying preliminary issues) inevitably prolongs litigation and builds up costs.

D Applying the principles distilled after a study of the cases relating to O 33 r 2 as stated earlier, I can find no reason to hold that on existing material, it would be justiciable to allow the application. I grant that the preliminary point procedure can in certain cases achieve the twin aims of economy of time and simplicity of proceedings. But it must be realized E that such cases where such procedures can apply must be so clear, that their factual matrix must exhibit an aura of transparency untrammelled by any possibility of assumption of facts.

On the issue of ss 7 and 12 of the Partnership Act 1961, I am guided by the leading text on partnership, namely *Lindley on Partnership* which F was accepted and followed in *Mercantile Credit Co Ltd v Garrod Another* [1962] 3 All ER 1103 wherein Mocatta J said at p 1106:

> ... Accordingly, the arguments of counsel for the defendant, based on the partnership deed are, to my mind, irrelevant. *Lindley on Partnership* says at p 168:
>
> G 'The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible, and, as may readily be conceived, an act which is common in the prosecution of one kind of business in the ordinary way may not be required for carrying on another business of H a different character.'

Having considered the submissions of the parties and all the cases referred to therein and by dint of rubbing the letter of the law into the essence of facts, I am constrained to dismiss this application with costs.

I *Application dismissed with costs.*

Reported by Loo Lai Mee